



Eight best-practices for mediating single-plaintiff wage-and-hour claims

Because wage-and-hour damages can be calculated more precisely, the parties may not be as far apart in their settlement valuations

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Wage-and-hour claims – whether brought as individual, representative, or class claims, or as part of a larger lawsuit involving discrimination, retaliation or harassment allegations – provide unique opportunities for settlement. Wage-and-hour liability can be easier to establish due to time- and pay records having the potential to demonstrate clear underpayment of wages in some circumstances. Furthermore, compared to the potential damages in harassment and/or wrongful termination claims, wage-and-hour exposure can be calculated more precisely for the purposes of settlement discussions, which can result in the parties not being as far apart in their determination of reasonable settlement value.

This article suggests eight best practices to increase the likelihood of settling a case involving wage-and-hour claims in a mediation. The article focuses on mediating single-plaintiff wage-and-hour cases, although many of the same best practices are applicable to representative and class claims.

1. Get the evidence you need

Mediation can be successful at all stages of a case, including prelitigation. However, it is critical that you do what it takes at whatever stage you choose for mediation to maximize your chances of success. If you are mediating a wage-and-hour case very early in the process, it is important to have enough evidence to present a damages assessment that is as accurate as possible. In some situations, the defendant may have failed to keep proper records, and the plaintiff will need to prepare a damages assessment using reasonable inferences. In these instances, your client may establish an entitlement to damages even if they cannot prove with absolute certainty their exact hours worked. Rather, their burden is met if they can establish that they performed work for which they were not compensated at the

appropriate rate of pay. (See *Hernandez v. Mendoza* (1988) 199 Cal.App.3d 721, 727.) However, it is always best if your client's testimony can be corroborated with other evidence to the extent that is possible.

If documents and other evidence necessary to establish your client's damages exist, you should obtain this evidence through formal discovery requests or through an informal agreement with defense counsel to provide you with the documents you need to prepare your damages analysis. You should have enough documentation going into the mediation to be able to persuasively demonstrate to the defendant that there is substantial risk if they do not settle.

2. Obtain evidentiary support from witnesses or other sources

In addition to documents, obtaining statements from witnesses or other supporting evidence in advance of the mediation is critical to maximizing recovery in wage-and-hour cases. Employers generally dispute the veracity of employees' claims, such as that they were unable to take meal or rest breaks because of work demands, were required to work off the clock, or were not paid all wages due. Obtaining declarations from credible witnesses who can corroborate your client's claims will go a long way in increasing the defense's perceived settlement value of the case.

Other potentially important sources of evidence can include electronic entry and exit records from parking structures, surveillance footage of your client's workspace showing when they started and stopped the workday and if and when they took breaks, and electronic entry and exit records from the building where your client worked.

3. The numbers count, so count the numbers

Integral to reaching a settlement is creating a detailed, accurate, and thorough accounting of the plaintiff's damages, penalties, and interest. Math is precise, so

use it to your advantage. If it is very time-prohibitive to accurately calculate damages for the entire statute of limitations period – for example, a case where non-discretionary bonuses were paid every pay period but not factored into the regular rate of pay for the purposes of determining overtime wages over four years – then at a minimum, perform an accurate calculation based on a representative period of time that can be extrapolated on a pro rata basis over the entire relevant period.

The calculation should clearly compare what was paid against what should have been paid on a daily, weekly, or pay period basis – whichever is most accurately determinable based on available records. The same analysis should be performed for any claimed missed meal and rest breaks; each missed break should be calculated according to the actual days your client performed work, and your calculation must account for days or weeks in which your client did not work, such as during holidays, sick days, vacation days, or leaves of absence.

Consider retaining an expert to assist you with your damages calculation. There are forensic accounting experts who specialize in mediation and can prepare a damage model for a reasonable cost. You should consider if the budget is available to incur this cost as it can heighten the credibility of your damages model.

4. Include all recoverable amounts in your damages calculation

Wage-and-hour claims can entitle the plaintiff not only to the underlying unpaid wages or missed break premiums, but also to various penalties, liquidated damages and interest. All items of potentially recoverable amounts should be accurately calculated and included in your accounting for the entire relevant period to maximize settlement value. However, non-recoverable items, such as claims for underpayment of wages or break penalties that fall outside the statute of limitations, should not be included in your calculation. This includes penalties for



deficient paystubs pursuant to Labor Code section 226, which have a one-year statute of limitations and may not be recoverable in their entirety or may only be recoverable for a limited number of pay periods due to the passing of time between the date the plaintiff's employment ended and the date the complaint is filed. It is therefore important to factor in the filing date of the complaint (and/or any tolling resulting from the filing of an administrative complaint or an informal agreement between counsel) and count the appropriate one-, three- or four-year period backwards as the earliest date of any violation; and include the correct final date of employment as the last possible date of recovery.

5. Make reasonable assumptions

To increase the likelihood of reaching a settlement, it is important to make reasonable determinations regarding the underlying assumptions you will use for your calculations to avoid negatively impacting your client's credibility. For example, consider whether claiming that your client never had an opportunity to take even one rest break throughout their entire employment may not be viewed as credible given the nature of the work they performed and could hurt your chances of obtaining a successful outcome, particularly where your client has other valuable claims that will require you to establish their strong credibility.

In addition, consider the possibility that there was variation in overtime or missed breaks week to week or year to year or during seasonal fluctuations in the business. By showing that you made careful and conservative considerations in setting out the violations your client is claiming occurred, you will give the defense less reason to dismiss your client outright as dishonest and not believable, which would impede reaching a settlement.

6. Share your work

Share your detailed damages analysis with the defense at least a week in advance of the mediation, or preferably even earlier, so that they can take your calculations into account in discussing settlement authority with their clients and other interested parties. Although there will often be disagreements between the two sides about the hours your client claims they worked or

the number of breaks they claim they missed, you do not want your assumptions to be based on mistakes in the underlying facts, as this will lead to inaccurate calculations that can derail an opportunity to reach a reasonable settlement.

Factual errors can include using an incorrect hourly rate during a certain time period, inaccurate start or end dates of employment, or failing to account for periods where the plaintiff had a temporary break from employment, such as a medical or other leave of absence, which can be verified via personnel or other records. It is better to learn prior to or at the mediation that you used the wrong hourly rate or that the plaintiff actually worked 112 weeks rather than the 190 weeks you had calculated, because you shared your calculation with the defense in advance of the mediation and they provided you with credible evidence to the contrary, rather than have a settlement fail due to a misunderstanding over what should be undisputed facts underlying both sides' damages analysis.

Where possible, cite the record of the documents provided by the employer. Indicate where there are incomplete, missing, or inaccurate records for which assumptions or testimonial evidence are used. Make it clear to the mediator and the defense what assumptions were made so that the focus of the day can be on the "variables" that are not contained in the documentary record.

7. Include a damages chart in your brief

You should include your full, detailed analysis spreadsheet as an exhibit to your mediation brief. It is also helpful to include a chart within the body of the mediation brief that itemizes the amount of each individual claim of unpaid wages, overtime, break premiums, penalties, liquidated damages, and interest the plaintiff is seeking to recover and includes the sum total of the claim amount at the end. This is a user-friendly way for the defense and mediator to see what the plaintiff is claiming as their best-case recovery scenario in addition to attorneys' fees and costs.

8. Research and cite applicable law on unclear issues

Be prepared with caselaw to support arguments when you foresee there may be a

disagreement not only on the facts but also on the law that applies. For example, if you are claiming that your client is owed substantial unpaid overtime because they were misclassified as an exempt employee, and you know that the defendant will be relying on one or more exemptions to oppose your claim, research and cite favorable, analogous cases in your brief to support your position that your client's job duties did not qualify them for any exemption. Wage-and-hour law is constantly changing. It is critical to stay current on statutory developments and recent court decisions to understand the various laws that apply to your client's underlying facts, recoverable damages, and penalties to obtain the maximum recovery.

In conclusion, by putting in the effort in advance of mediation to obtain persuasive evidence in support of your client's claims and preparing a thorough and accurate accounting of all recoverable damages, penalties, and interest, and by sharing your detailed calculations with defense counsel and the mediator well in advance of mediation, you will significantly increase the likelihood of reaching a settlement in a wage-and-hour case.

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